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MAR 8 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 807

SHERMAN H. SKOLNICK,

Petitioner,

vs.

CHARLES T. MARTIN; and ARTHUR LILLY, and CHARLES R. PERRIGO,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

In 1958 plaintiff sued (Circuit Court of Cook County, No. 58 C 7219) defendants Arthur Lilly and Charles R. Perrigo as partners in the stock brokerage firm of Hornblower & Weeks. (Pet. 8; Abst. 2.) Defendant Martin was one of the attorneys representing defendants in this case. In preparing the defense, defendants took the deposition of plaintiff on January 7, 1960. Plaintiff, his lawyer, his father, and his court reporter were all present during the entire deposition at which Martin interrogated the plaintiff. (Pet. 8, 9, 10; Abst. 4.) Neither plaintiff, his lawyer nor plaintiff's father made any protest respecting the conduct of the deposition.

Plaintiff waited nearly two years, *i.e.* until January 4, 1962, to allege misconduct in the taking of this deposition, which he alleged in a second suit filed in the United States District Court in Chicago against Lilly, Perrigo and Martin. (Abst. 7.)

Plaintiff's petition for certiorari stems from a third suit which plaintiff filed in the Superior Court of Cook County. This third suit also alleged misconduct in the taking of the deposition and was identical as to allegations and as to parties to the second suit filed in the United States District Court. The Superior Court of Cook County dismissed this third suit on the ground that "there is another action pending between the same parties for the same cause." (Abst. 16.) This dismissal was pursuant to Ill. Rev. Stat. 1961, Ch. 110, § 48(1)(c) which provides:

> "(1) Defendant may, within the time for pleading, file a motion for dismissal of the action . . . upon any of the following grounds. . . .
>
> "(c) That there is another action pending between the same parties for the same cause."

The plaintiff appealed this order of dismissal directly to the Illinois Supreme Court. The Illinois Supreme Court transferred the appeal to the Appellate Court of Illinois, First District, pursuant to Ill. Rev. Stat. 1961, Ch. 110, § 86, which provides:

> "If an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to that court, it shall be the duty of the court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the clerk of the proper court. . . ."

Plaintiff has refused to proceed with the appeal in the Appellate Court of Illinois. (Pet. 11.) Rather plaintiff has filed this petition for certiorari to the "Supreme Court of the State of Illinois and/or The Appellate Court."

ARGUMENT.

Plaintiff's petition is based on the theory that the dismissal of his suit by the Illinois court (pursuant to Ch. 110, § 48(1)(c)) because of another action pending in the United States District Court between the same parties for the same cause violates the Fourteenth Amendment of the United States Constitution. Plaintiff cites no authority supporting his theory. We have found no case where such a fantastic claim was even made. Certainly it is not a violation of the Fourteenth Amendment for the Illinois legislature to determine that as a matter of public policy defendants should not be harassed by identical suits by the same plaintiff and that the dockets of the Illinois courts should not be crowded with such suits. The State of Illinois is not required to presume that a plaintiff will fail to get justice in the United States District Court.

Plaintiff's petition also ignores the fact that there has been no "Final judgment or decree rendered by the highest Court of a State" as required for jurisdiction in this court. (28 U. S. C. § 1257.) The appeal in this case was transferred by the Illinois Supreme Court to the Appellate Court of Illinois. There was no final judgment or decree by the Illinois Supreme Court. Plaintiff argues in his brief in the State court (p. 14) that the Illinois statute (Ch. 110, § 48 (1)(c)) should not be construed to permit dismissal because of a case pending in the federal court but should be limited to situations where both cases are pending in the Illinois state courts. This issue of statutory construction has not been passed on in this case by an Illinois court of review.

If the Illinois Appellate Court should find that the trial court correctly construed Ch. 110, § 48(1)(c) in dismissing plaintiff's case because an identical case was pending in a federal court, plaintiff may file a petition for leave to appeal this decision to the Illinois Supreme Court pursuant to Ill. Rev. Stat. 1961, Ch. 110, § 75(2)(b). Only when such a petition is denied by the Illinois Supreme Court, or if the petition is granted, the opinion of the lower court affirmed, would there be a "final judgment or decree rendered by the highest court" of Illinois as required by 28 U. S. C. § 1257. *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, 101 (1912); *Prudential Insurance Co.* v. *Cheek*, 252 U. S. 567 (1920), and subsequent opinion in *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 533 (1922); *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 341-345 (1896); *Grays Harbor, Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255-257 (1917).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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